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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:EEE:EB:QP3

PLR-102923-21

Date:

August 09, 2021

State S =
Plan =

Dear :

This responds to your letter of January 29, 2021, in which you request a private letter ruling related to the Plan's status as a length of service award plan described in section 457(e)(11)(B) of the Internal Revenue Code of 1986 (Code).

The following facts and representations have been submitted under penalties of perjury in support of your request:

State S is an eligible employer described in section 457(e)(1). The Plan provides length of service awards in the form of retirement and death benefits to long-term eligible volunteers. Any municipality of State S that meets the definition of eligible employer under section 457(e)(1)(A) may adopt a resolution or ordinance to allow volunteer members of its fire department, reserve officer program, and emergency medical district to enroll in the Plan. The Plan defines a volunteer as an individual who provides firefighting services, fire prevention services, emergency medical services, ambulance services, reserve police officer services, and/or related essential services for a municipality, and who does not receive compensation for these services except for (1) reimbursement for (or a reasonable allowance for) reasonable expenses incurred in the performance of these services, or (2) reasonable benefits (including benefits under the Plan), and nominal fees for these services, customarily paid by eligible employers in connection with the performance of these services by volunteers.

Once a participant has met the Plan's age and service requirements, the participant is entitled to a monthly benefit in an amount determined under the Plan. The Plan also includes provisions for a reduced, early retirement benefit. In addition, the Plan includes provisions regarding reduced amounts a participant would receive if the participant ceases services before attaining the age and year of service requirement. The Plan also provides for benefits upon a participant's death.

Benefits under the Plan are funded by employer and participant contributions. The Plan provides that contributions and income attributable to such contributions will be held and invested by the plan administrator. The Plan also provides that participants and beneficiaries have an unsecured right to benefits under the Plan. It further provides that the assets attributable to the contributions of each municipality will be subject to the claims of that municipality's creditors. The rights of any member or beneficiary to payments under the Plan are nonassignable and nontransferable.

Based on the foregoing, you request rulings that:

1. The Plan is a length of service award plan (LOSAP) within the meaning of section 457(e)(11)(A), and therefore is not subject to section 457;
2. Amounts paid to participants or their beneficiaries are includible in the individual's gross income only in the taxable year in which such amounts are paid, pursuant to section 451; and
3. Benefits under the Plan paid to participants or their beneficiaries are not treated as wages for purposes of Federal Insurance Contribution Act (FICA) taxes.

Section 451(a) and § 1.451-1(a) provide that an item of gross income is includible in gross income for the taxable year in which actually or constructively received by a taxpayer using the cash receipts and disbursements method of accounting. Under § 1.451-2(a), income is constructively received in the taxable year during which it is credited to the taxpayer's account, set apart, or otherwise made available so that the taxpayer may draw on it at any time. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.

Various revenue rulings have considered the tax consequences of nonqualified deferred compensation arrangements. Rev. Rul. 60-31, Situations 1-3, 1960-1 CB 174, holds that a mere promise to pay, not represented by notes or secured in any way, does not constitute receipt of income within the meaning of the cash receipts and disbursements method of accounting. See also, Rev. Rul. 69-650, 1969-2 CB 106, and Rev. Rul. 69-649, 1969-2 CB 106.

Section 457 contains rules for the taxation of eligible deferred compensation plans of eligible employers. The term "eligible employer" is defined in section 457(e)(1) to include a State, political subdivision of a State, and any agency or instrumentality of a State or political subdivision of a State, and any other organization (other than a governmental unit) exempt from tax under subtitle A of the Code.

Section 457(a)(1)(A) provides that in the case of a participant in an eligible deferred compensation plan of an eligible governmental employer described in section 457(e)(1)(A), any amount of compensation deferred under the plan and any income attributable to the amounts so deferred shall be includible in gross income only for the taxable year in which such compensation or other income is paid to the participant or beneficiary.

An “eligible deferred compensation plan,” as defined in section 457(b), must, among other things, provide that the annual deferral amount for a taxable year shall not exceed the lesser of the applicable dollar amount (as determined under sections 457(b)(2) and (e)(15), \$19,500 in 2021) or 100 percent of the participant's includible compensation. Section 1.457-2(b)(3) provides that if a plan is a defined benefit plan within the meaning of section 414(j), the annual deferral for a taxable year is the present value of the increase during the taxable year of the participant's accrued benefit that is not subject to a substantial risk of forfeiture (disregarding any such increase attributable to prior annual deferrals). For this purpose, present value must be determined using actuarial assumptions and methods that are reasonable (both individually and in the aggregate), as determined by the Commissioner.

Section 457(g) provides that a plan maintained by an eligible governmental employer described in section 457(e)(1)(A) shall not be treated as an eligible deferred compensation plan unless all assets and rights purchased with such deferred compensation amounts and all income attributable to such amounts, property, or rights of the plan are held in trust for the exclusive benefit of participants and their beneficiaries. Section 457(g)(2)(A) provides that a trust described in section 457(g)(1) shall be treated as an organization exempt from tax under section 501(a). Section 1.457-8(a)(2)(i) provides that the terms of the trust must make it impossible, prior to the satisfaction of all liabilities with respect to participants and their beneficiaries, for any part of the assets and income of the trust to be used for, or diverted to, purposes other than for the exclusive benefit of participants and their beneficiaries.

Section 457(f)(1)(A) provides that if a plan of an eligible employer providing for a deferral of compensation is not an eligible deferred compensation plan, compensation deferred under such plan shall be included in the participant's gross income for the first taxable year in which there is no substantial risk of forfeiture of the rights to such compensation. Section 457(f)(3)(B) states that a person's rights to compensation are subject to a substantial risk of forfeiture if such person's rights are conditioned upon the future performance of substantial services by any individual. Any amount deferred under a section 457(f) plan that is not subject to a substantial risk of forfeiture (i.e., a vested amount) is currently included in gross income (even if not actually or constructively received), and the amount subsequently paid or made available is taxed under section 72. See § 1.457-11(c).

Section 457(e)(11)(A)(ii) provides that a plan paying solely length of service awards to

bona fide volunteers or their beneficiaries on account of qualified services performed by such volunteers is treated as not providing for the deferral of compensation under section 457. Section 457(e)(11)(C) defines qualified services as fire fighting and prevention services, emergency medical services, and ambulance services.

Section 457(e)(11)(B) provides special rules applicable to a LOSAP. Section 457(e)(11)(B)(i) defines the term “bona fide volunteer” to include only persons whose only compensation received for performing qualified services are reimbursements for (or reasonable allowances for) reasonable expenses incurred in performing such services or reasonable benefits (including length of service awards), and nominal fees for such services, customarily paid by eligible employers in connection with the performance of such services by volunteers.

The Plan covers volunteers in a municipality’s reserve officer program who provide reserve officer services. Reserve officer services are not included in the definition of qualified services in section 457(e)(11)(C), i.e., fire fighting and prevention services, emergency medical services, and ambulance services. Therefore, the Plan is not a LOSAP under section 457(e)(11)(A)(ii).

The Plan does not conform to the maximum deferral limitations or trust requirements of section 457(b) or (g). Therefore, the Plan is not an eligible deferred compensation plan under section 457(b).

Because the Plan is not a LOSAP under section 457(e)(11)(A)(ii) and because the plan is not an eligible plan as defined in section 457(b), the benefits provided under the plan are subject to section 457(f).

FICA taxes are composed of Old-Age, Survivors, and Disability Insurance Tax (social security taxes) and hospital insurance taxes (Medicare taxes). Social security taxes are imposed by sections 3101(a) (employee’s portion) and 3111(a) (employer’s portion) and Medicare taxes are imposed by sections 3101(b) (employee’s portion) and 3111(b) (employer’s portion) on all wages as defined in section 3121(a). Section 3121(a) defines wages as all remuneration for employment, including the value of remuneration paid in any other medium (including benefits), except that wages does not include certain remuneration as specified in section 3121(a).

Section 3121(a)(5)(E) excludes from the definition of wages any payment made to, or on behalf of, an employee or the employee’s beneficiary under or to an exempt governmental deferred compensation plan as defined in section 3121(v)(3). Section 3121(v)(3) provides that an “exempt governmental deferred compensation plan” is any plan providing for deferral of compensation established and maintained for its employees by the United States, by a State or political subdivision thereof, or by an agency or instrumentality of any of these. However, section 3121(v)(3)(A) excludes from this definition any plan to which section 457(f)(1) applies.

As provided above, section 457(f)(1) applies to the benefits under the Plan. Thus, the Plan is not an exempt governmental deferred compensation plan exempted from FICA taxes under section 3121(a)(5)(E) and the value of the benefits under the Plan are wages subject to FICA taxes.

Since section 3121(v)(3)(C) defines a “nonqualified deferred compensation plan” as any plan or other arrangement for deferral of compensation other than an exempt governmental deferred compensation plan, the Plan is a nonqualified deferred compensation plan for FICA tax purposes. Under section 3121(v)(2)(A), amounts deferred under the Plan must be taken into account for FICA tax purposes the later of (i) when the services to which such amounts apply are performed, or (ii) when there is no substantial risk of forfeiture of the rights to such amounts.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalties of perjury statement executed by an appropriate party, as specified in Rev. Proc. 2021-1, 2021-1 I.R.B. 1, section 7.01(16)(b). This office has not verified any of the material submitted in support of the request for ruling, and such material is subject to verification on examination. The Associate office will revoke or modify a letter ruling and apply the revocation retroactively if there has been a misstatement or omission of controlling facts; the facts at the time of the transaction are materially different from the controlling facts on which the ruling was based; or, in the case of a transaction involving a continuing action or series of actions, the controlling facts change during the course of the transaction. See Rev. Proc. 2021-1, section 11.05.

This letter ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

A copy of this letter has been sent to your authorized representatives in accordance with a power of attorney on file in this office.

Sincerely,

Cheryl Press
Senior Counsel, Qualified Plans Branch 4
(Employee Benefits, Exempt Organizations, and
Employment Taxes)

cc: